SUPREME COURT, U. S.

APR 15 1974

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73-1540

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

DARRELL L. SECHREST AND EVELYN F. SECHREST,
Petitioners

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPENDIX

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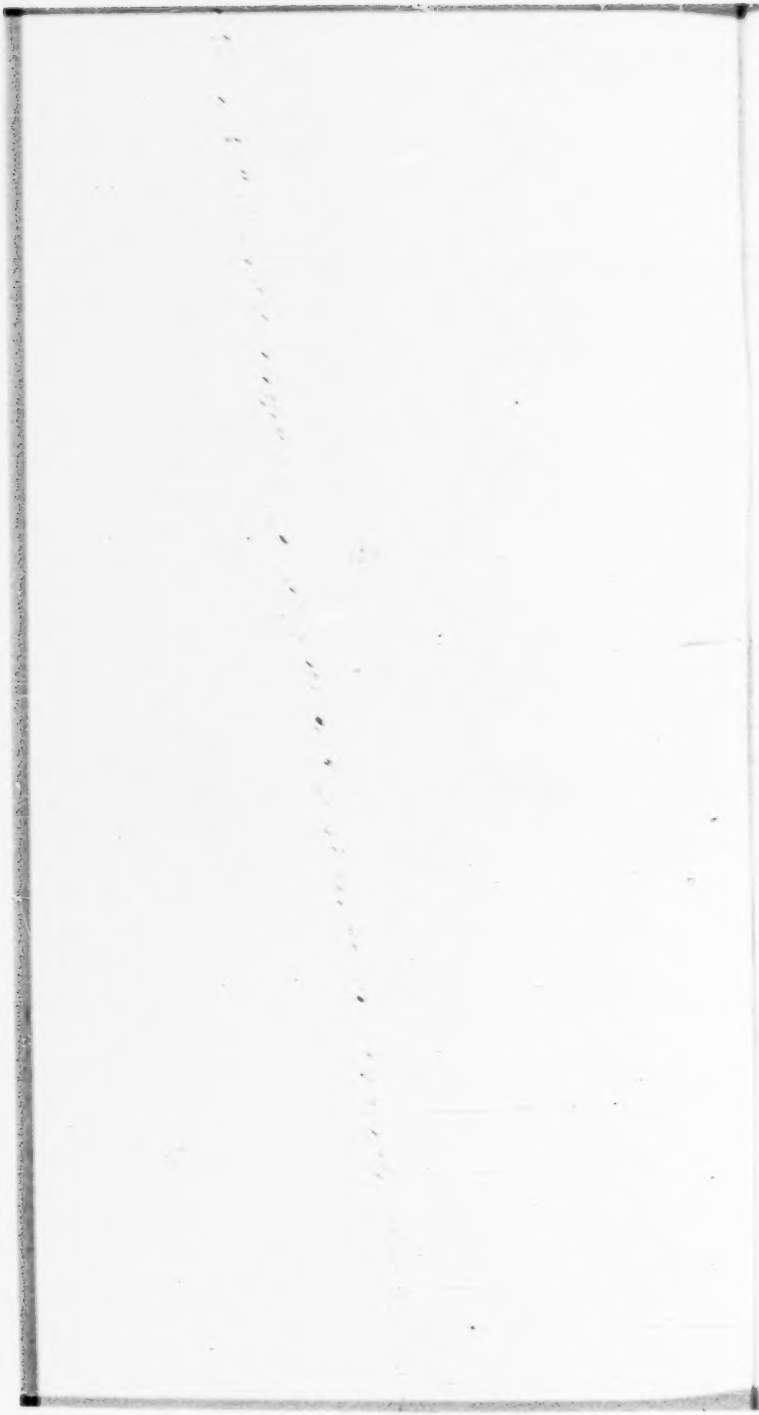

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No._____

Darrell L. Sechrest
and
Evelyn F. Sechrest,

Petitioners,

vs.

United States of America, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit reversing a final judgment of the United States District Court for the Middle District of North Carolina, wherein

originally the petitioners were plaintiffs and the respondent was defendant.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears as Appendix A to this petition, and is reported at 490 F.2d 102. The opinion and judgment of the United States District Court for the Middle District of North Carolina appear as Appendix B to this petition, and the opinion is reported at 351 F.Supp. 344.

JURISDICTION

The decision sought to be reviewed was entered by the United States Court of Appeals for the Fourth Circuit on January 14, 1974, was reported at 490 F.2d 102, and appears as Appendix A of this petition. The Order to Mandate was issued to the District Court on January 31, 1974. The jurisdiction of this Court to review by writ of certiorari the decision in question is conferred by Title 28, United States Code, §1254(1).

QUESTION PRESENTED

Did the Court of Appeals err in reversing the summary judgment entered by the District Court in favor of the petitioners holding that a payment of $9,000.00 to the former wife of petitioner Darrell L. Sechrest (hereinafter Darrell) was deductible under Section 215 of the Internal Revenue Code of 1954 as a "periodic payment," when it was inextricably tied to a division of the petitioner Darrell's income, was

indeterminable from the face of the separation agreement entered into by the petitioner Darrell and his former wife, was contingent upon the subsequent remarriage of the former wife and the adjustable gross income of the petitioner Darrell at the time of such remarriage, and was agreed upon by the parties to the separation agreement that such payment was to be treated as a division of income taxable to the recipient?

APPLICABLE STATUTES

The statutes applicable to this petition are Section 71(a)(2) and (c) and Section 215(a) of the Internal Revenue Code of 1954, and said sections are set forth in Appendix C hereto.

STATEMENT OF THE CASE

This suit involves federal income taxes for the year 1967 in the amount of $4,418.40. After an assessment in this amount paid in full by the petitioners, they filed a claim for refund which was disallowed by the Commissioner of Internal Revenue. On March 1, 1972, the petitioners instituted this suit by filing a complaint in the District Court and on November 29, 1972, the District Court filed a memorandum opinion in favor of the petitioners and that same date entered a judgment granting the petitioners' motion for a summary judgment. The respondent filed a timely notice of appeal on January 29, 1973. Thereafter on January 14, 1974, the Court of Appeals for the Fourth Circuit reversed the decision of the

District Court and remanded the cause back to the District Court for entry of a judgment in favor of the respondent.

The facts, fully stipulated by the parties, may be summarized as follows:

The petitioner Darrell was married to Barbara Sechrest (hereinafter Barbara) in 1945. Two children were born during the marriage. Petitioner Darrell and Barbara were separated in 1961, and on April 2, 1965, they executed a contract and deed of separation.

Under the contract and deed of separation, the petitioner Darrell promised to make monthly payments for support and maintenance of Barbara and the two minor children. The monthly payments were on a sliding scale ranging from a possible $250.00 per month to $1,375.00 per month, depending on and being inextricably tied to the petitioner Darrell's annual adjusted gross income. The contract and deed of separation also required the petitioner Darrell to make an additional payment in a lump sum to Barbara upon her remarriage,said payment to be the equivalent of twelve (12) times the monthly payments being made in the month preceding the month in which Barbara's remarriage occurred, said monthly payments being inextricably tied to the petitioner Darrell's annual adjusted gross income. Paragraph 4(g) of the contract and deed of separation provided in pertinent part as follows:

"In the event the parties hereto shall hereafter be divorced and the party of the second part [Barbara]

shall remarry, then upon such remarriage the party of the first part [Darrell] shall pay to the party of the second part within thirty (30) days after such remarriage a lump sum in an amount equivalent to 12 times the monthly payment due and payable by the party of the first part to the party of second part for the month preceding the month in which the party of the second part remarries."

In 1967, Barbara remarried and at the time of her remarriage, the petitioner Darrell was making payments to her of $750.00 per month, said sum being based upon his annual adjusted gross income. The petitioner Darrell thereupon in accordance with the above terms of the contract and deed of separation made a payment to Barbara in the amount of $9,000.00 (12 times $750.00).

Upon an audit of the petitioners' income tax return for the year 1967, the Commissioner of Internal Revenue disallowed the deduction of the $9,000.00 payment to Barbara on the ground that this payment was not a"periodic payment" within the meaning of Section 71(a)(2) of the Internal Revenue Code of 1954. The petitioners paid the additional tax resulting from this determination and then instituted this suit in the District Court.

The District Court held that this payment was a "periodic payment" within the meaning of Section 71(a) of the Internal Revenue Code of 1954, and entered judgment granting petitioners' motion for

summary judgment. Thereafter the United States Court of Appeals for the Fourth Circuit reversed this decision.

REASONS FOR ALLOWANCE OF WRIT

There are two reasons why the Court should grant this petition, these reasons being somewhat intertwined. The first reason is that the issue involved in this cause relates to the construction of the term "periodic payments" as used in Section 71(a)(2) of the Internal Revenue Code of 1954, a term which has increasing importance to the taxpaying public and which has become increasingly confusing to income taxpayers. The second reason is that the various Circuits of the Courts of Appeals of this country have applied with frequent inconsistency a wide ranging number of tests to determine whether or not payments made pursuant to divorce decrees or written separation agreements constituted "periodic payments," thus rendering them taxable to the recipient and deductible to the payor, and this inconsistency has amplified the previous confusion existing over the definition of the term.

By statute a wife's gross income includes "periodic payments" which are received after a written separation agreement is executed if such payments are made under such an agreement and on account of the marital or family relationship. 26 U.S.C. §71(a)(2). The husband is entitled to a deduction of such "periodic payments" which are includible in the wife's income under 26 U.S.C. §71(a)(2). 26 U.S.C. §215.

The present statutes providing for the inclusion of such payments in the wife's income and the deduction of such payments by the husband correspond to Sections 22(k) and 23(u), respectively, of the Internal Revenue Code of 1939, which sections were enacted by §120 of the Revenue Act of 1942, c. 619, 56 Stat. 798. The purpose of these provisions, as indicated in the report of the Senate Finance Committee was "to provide in certain cases a new income tax treatment for payments in the nature of, or in lieu of, alimony or an allowance for support as between divorced or legally separated spouses." S. Rep. No. 1631, 77th Cong., 2d Sess. 83, 1942-2 Cum. Bull. 504, 568.

The Report of the House Ways and Means Committee indicated that the purpose of the section relating to "periodic payments" was to grant the payor husband a deduction for payments discharging the obligation arising out of the family or marital relationship in recognition of the general obligation to support, but not to payments attributable to the satisfaction of any interest which the recipient wife held in any property, such payments constituting a transfer of the property. The obvious intent of Congress in permitting deductions by the payor husband and requiring inclusion of the payments in the gross income of the recipient wife was to require the one receiving support to treat it as income but not to allow any preferential tax treatment for divisions of property.

Unfortunately, Courts of Appeals of the various Circuits have devised a number of tests by which to determine whether or not payments made by a husband to a wife pursuant to a court decree or a written separation agreement were "periodic payments," and these tests have quite frequently been devised without reference to the original intent of Congress to provide for deduction of payments for support derived from income and not to allow deduction of payments in lieu of transfers of property of some other description to effectuate divisions of capital. These various tests promulgated in the different Circuits have further complicated what was already an ill defined term of the Internal Revenue Codes of 1939 and 1954.

In Lounsbury v. Commissioner, 321 F.2d 925 (9 Cir. 1963), the court found that the payment of the specified amount of $10,000.00 following a payment of $250.00 per month for 4 3/4 years constituted a capital transfer rather than a "periodic payment," stating that in order to constitute a "periodic payment," the payment would have to be subject to traditional contingencies ordinarily associated with alimony payments, including the death of either spouse, remarriage of the wife, or a change in the economic status of the parties.

In holding that the transfer of property and the payment of cash by a husband to his former wife was not deductible by the husband, the Seventh Circuit in Houston v. Commissioner, 442

F.2d 40 (7 Cir. 1971), based its decision on the lack of a contingency in the agreement for the payment and the indication contained in the agreement itself that the payment was intended to be in the nature of a transfer of property rather than the payment of support. In another Seventh Circuit case, Van Orman v. Commissioner, 418 F.2d 170 (7 Cir. 1969), the court held that where a taxpayer in a marital settlement agreed to provide his wife with a home within ten years of the settlement regardless of whether or not she remarried, the terms provided for a property settlement and were hence not deductible. The court said, "To be 'periodic' payments must be for an indefinite time or conditional and therefore indefinite in amount." 418 F.2d at 172. The court also based its opinion on the fact that the payment for a home was not a payment by which the wife shared in the husband's income. Thus, while the Ninth Circuit in Lounsbury based its decision on the lack of a contingency in the payments involved therein, the Seventh Circuit in Houston and Van Orman adopted the position that not only the presence of a contingency constituted a test as to whether or not a payment was "periodic," but also whether or not the agreement pursuant to which the payment was made indicated whether the payment was intended to be a transfer of property and whether or not the payment was, in fact, a payment derived from the income of the husband.

The Fifth Circuit in Taylor v. Campbell, 335 F.2d 841 (5 Cir. 1954),

determined that payments involved in that case were "periodic payments" because the wife had been compensated for her property rights elsewhere in the agreement, the payments were contingent on the death of either of the parties or the remarriage of the wife, and the parties had provided for the possible tax consequence of the payments themselves.

In yet another case, Baker v. Commissioner, 205 F.2d 369 (2 Cir. 1953), it was held that where an agreement provided for the payment of set amounts up to a certain specified amount clearly expressed in the agreement, the payments were not installments on a principal sum but were deemed "periodic payments" because such payments were subject to the contingencies of the death of the wife or her remarriage.

Finally, the Fourth Circuit has adopted in Commissioner v. Senter, 242 F.2d 400 (4 Cir. 1957), the test applied by the Tax Court in Ralph Norton, 16 TC 1216 (1951), aff'd. 192 F.2d 960 (8 Cir. 1951), which requires the court to examine the payment provided for by the parties to the separation agreement to determine whether or not it is in the nature of a division of capital or a distribution from the payor's income. In Senter, the husband had agreed to remit to his wife on her remarriage a sum equal to three times the average annual payments to which she had previously been entitled, which payments were derived from a trust set up by the husband's grandparents. Obviously, such a payment made at one

time could not be made from the income of the payor for the year in which the payment was made. On the other hand, the payment made by the petitioner Darrell in the present cause was an amount equivalent to approximately 33% of the payor's most recent annual adjusted gross income. In fact, the payment made in the present cause was, as found by the District Court, in an entirely separate part of the separation agreement from the property settlement and was included in the provisions with respect to support. In addition, the payment which was made by the petitioner Darrell in the present cause was subject not only to the contingency of the wife's remarriage but also to the economic status of the payor, for the amount of the payment was derived directly from the amount of the monthly payments for support of the wife, which payments were in turn directly based upon the most recent annual adjusted gross income of the husband. Furthermore, the petitioner Darrell in the present cause and his former wife had explicitly agreed that the payments would be taxable to the wife and deductible by the husband. Therefore, the payment made by the petitioner Darrell met every test promulgated by every circuit yet to set guidelines for determining whether or not a payment constituted a periodic payment.

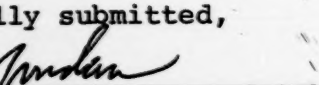
If the ruling of the Fourth Circuit in the present cause is allowed to stand it can only result in the further obfuscation of all taxpayers who need a clear definitive explanation of what

constitutes a "periodic payment" and what does not. Furthermore, the decision of the Fourth Circuit, because no clear guidelines are afforded the taxpayer, will most surely result in each case being judged individually without any reliable definition of the term "periodic payment" being available to the taxpayer. The result will be the government, in the words of Justice Douglas in Commissioner v. Lester, 366 U.S. 299 (1961), having "a longer purse and more endurance than any taxpayer," 366 U.S. at 307, will continue to resort to litigation in matters involving payments pursuant to separation agreements, and the taxpayer will be at a severe disadvantage, not having well delineated guidelines as to what constitutes a "periodic payment" and what does not.

CONCLUSION

For the reasons set forth in this petition, we respectfully submit that certiorari should be granted.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Darrell L. Sechrest and
Evelyn F. Sechrest, Appellees,
v.
United States of America,
Appellant.

No. 73-1292.

Argued Nov. 5, 1973.
Decided Jan. 14, 1974.

Appeal by government from a decision of the United States District Court for the Middle District of North Carolina, at Greensboro, Gordon, Chief Judge.

Elmer J. Kelsey, Atty., Tax Div., U.S. Dept. of Justice (Scott P. Crampton, Asst. Atty. Gen., Meyer Rothwacks, Dennis M. Donohue, Attys., Tax Div., U.S. Dept. of Justice, and William L. Osteen, U.S. Atty., on brief), for appellant.

William W. Jordan, Greensboro, N.C. (Jordan, Wright, Nichols, Caffrey & Hill, Greensboro, N. C., on brief), for appellees.

Before BUTZNER, FIELD and WIDENER, Circuit Judges.

FIELD, Circuit Judge:

The Government appeals from a decision of the district court that a lump sum payment of $9,000 made by Darrell L. Sechrest (Darrell), one of the taxpayers, to his former wife was a "periodic" payment within the meaning of Section 71(a) of the Internal Revenue Code of 1954 (26 U.S.C.) and was therefore deductible under Section 215 of the Code.

The facts, fully stipulated, may be summarized as follows: Darrell and Barbara Sechrest (Barbara) were married in 1945 and separated in 1961. On April 2, 1965, they executed a contract and deed of separation, and when they were divorced later that year the instrument was incorporated into the divorce decree. Under paragraph (4)(a) of the contract Darrell agreed to make monthly payments to Barbara for the support and maintenance of her and their two minor children. The monthly payments were to be determined upon a sliding scale, ranging from a possible $250 a month to $1375 a month, based upon Darrell's annual adjusted gross income as defined and ascertained for the purposes of his federal income tax for any one year.

Paragraph (4)(g) of the agreement provided in part as follows:

> In the event the parties hereto shall hereafter be divorced and the party of the second part [Barbara] shall remarry, then upon such remarriage the party of the

> first part [Darrell] shall pay to the party of the second part within thirty days after such remarriage a lump sum in an amount equivalent to twelve times the monthly payment due and payable by the party of the first part to the party of the second part for the month preceding the month in which the party of the second part remarries.

In 1967 Barbara remarried and at that time Darrell was making payments to her in the amount of $750 per month. Pursuant to the terms of the contract, in August of 1967 Darrell paid Barbara the sum of $9,000 which was twelve times the amount of the payment due in the month immediately preceding the month of Barbara's remarriage. In the 1967 income tax return filed by the taxpayers, the $9,000 was included as a deduction for alimony paid to Barbara during the taxable year. The Commissioner disallowed the deduction and this litigation followed.

Section 71(a)(1) of the 1954 Code provides in pertinent part that if a wife is divorced from her husband under a decree of divorce, her gross income includes periodic payments received in discharge of a legal obligation which, because of the marital or family relationship, is imposed upon the husband under the decree or written agreement. The correlative Section 215 allows a deduction to the husband for those payments which are includible in the wife's

income under Section 71. These provisions were first enacted by Section 120 of the Revenue Act of 1942 and appeared in the 1939 Code as Sections 22(k) and 23(u), respectively.

In Commissioner of Internal Revenue v. Senter, 242 F.2d 400 (4 Cir. 1957), this court had occasion to consider a similar question under the corresponding provisions of the 1939 Code, and we think this case is controlled by that decision. In Senter the husband assigned to his wife for the support of herself and minor son one-third of the income that he was entitled to receive from the estates of his two grandparents. The agreement further provided, as here, that if the wife obtained a divorce and then remarried the periodic payments of income from the estates would cease and in such event the husband would pay to her a cash sum equal to what she would have been entitled to receive under the agreement for a three year period. The husband contended that the cash sum paid to his former wife upon her remarriage was a periodic support payment for which he was entitled to a deduction. Rejecting this argument, the court stated:

> "The purpose of 22(k) and 23(u) was to provide for a division of the taxability of income where the income itself was divided between husband and wife pursuant to a divorce or separation agreement, not to tax or to grant deductions

with respect to divisions or transfers of property made in final settlement of marital controversies." 242 F.2d at 403.

The opinion cited with approval the language of the Tax Court in Ralph Norton, 16 T.C. 1216, 1218, aff'd 192 F.2d 960 (8 Cir. 1951):

> "The word 'periodic' is to be taken in its ordinary meaning and so considered excludes a payment not to be made at fixed intervals but in a lump sum, and the fact that the statute made particular reference to periodic payments is some reason to believe that another kind of payment, that is an initial payment in some larger and undivided amount was considered in a different category. We may, we think, take judicial notice that divorce settlements or decrees not uncommonly provide some considerable amount payable immediately to the wife, in addition to regular or recurring payments for current support thereafter. We consider it reasonable to believe that Congress had such a practice in mind and did not intend to make the wife taxable upon the lump sum, original, or principal payments to be made here, but that it was something in the nature of division of capital, rather than from the husband's income so as to be deductible by him. At any rate, we think Congress

failed to provide that such a payment was 'periodic' and that, therefore, it is not within the statute." 242 F.2d at 403.

The court further found that whether the lump sum was an initial payment or was made upon the termination of the periodic payments was immaterial.

The decision in Senter accords with the consistent holding of the courts that a lump sum payment does not qualify as periodic even though the motivation for the payment is more akin to the discharge of an alimony responsibility rather than a property obligation. Lundgaard v. United States, 346 F.Supp. 1351, 1353 (D.Kan. 1972). As stated in Lounsbury v. C. I. R., 321 F.2d 925, 926 (9 Cir. 1963), "the controlling question here is not the source of the husband's duty to make provision. We may assume, arguendo, that the payment was in discharge of a marital (as distinguished from property) obligation. The controlling question to us is the manner in which that duty was met."

The district court distinguished Senter upon the basis that the payment there involved "the division of two estates" while the payment in the present case was "clearly a part of the plaintiff's obligation arising out of his marital status to support Barbara and is so clearly tied to the monthly periodic payments that it cannot be considered as a separate and distinct obligation

* * *." We find this attempted distinction lacking in validity. The lump sum payment in Senter did not involve a division of the two grandparents' estates, but rather was a cash settlement computed on the basis of the periodic payments which had been made from the estates to the wife through the partial assignment of income to her. In this respect it was not at all dissimilar from the present case where the amount of the monthly payments was used as a computative factor in arriving at the lump sum payment under the agreement. The only factual variance between Senter and the present case is that in Senter the periodic payments to the wife were computed with reference to the husband's income as derived from the estates, while here such payments were computed with reference to the husband's total adjusted gross income. In the context of the issue before us this is a distinction of no consequence whatever.

Since we conclude that the lump sum payment herein did not qualify as a "periodic payment" within the meaning of Section 71(a), the judgment of the district court is reversed and the case remanded with instructions to enter judgment in favor of the Government.

Reversed and remanded.

APPENDIX B

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Darrell L. Sechrest and
Evelyn F. Sechrest, Plaintiffs,
v.
United States of America,
Defendant.

No. C-56-G-72.

Action for refund of federal income taxes and interest.

William W. Jordan, Greensboro, N. C., for plaintiffs.

William L. Osteen, U. S. Atty., Greensboro, N. C., for defendant.

MEMORANDUM OPINION

GORDON, Chief Judge.

This action was initiated by the plaintiffs for a refund of federal income taxes and interest in the amount of $4,418.40 paid by the plaintiffs for the year 1967. The parties have stipulated to the facts of the case and the matter is now before the Court on cross motions for summary judgment.

The plaintiff, Darrell Sechrest, married Barbara Sechrest in 1945. There were two children born during the marriage. Darrell and Barbara separated in 1961 and on April 2, 1965, they executed a contract and deed of separation dated March 31, 1965. The contract and deed of separation was incorporated into a divorce decree granted on April 26, 1965.

Under the contract and decree of separation, Darrell Sechrest promised to make monthly payments for the support and maintenance of Barbara and their two minor children. The monthly payments were on a sliding scale ranging from a possible $250.00 a month, to $1,375.00 a month, depending on Darrell's annual adjusted gross income. Also incorporated into the contract and decree was an agreement by Darrell Sechrest that in the event his former wife Barbara remarried, he would pay to her within thirty days after her remarriage "a lump sum in an amount equivalent to twelve times the monthly payment due and payable by the party of the first part [Darrell Sechrest] to the party of the second part [Barbara Sechrest] for the month preceding the month in which the party of the second part remarries."

In 1967 Barbara Sechrest remarried and at the time of her remarriage, the plaintiff Darrell Sechrest was making payments of $750.00 per month. The plaintiff complied with the agreement and made a lump sum payment of $9,000.00 to Barbara.

Then Darrell also remarried in 1967 and in filing a joint income tax return for that year, the plaintiffs claimed a deduction of alimony in the amount of $15,875.00 of which $6,875.00 was the sum of the regular monthly payments made to Barbara before her remarriage. The Commissioner of Internal Revenue disallowed the remaining $9,000.00 and assessed a deficiency which the plaintiffs paid prior to instituting this suit.

The very narrow question of law facing this Court is whether periodic alimony payments when lumped together and paid at one time lose their "periodic" character and hence are no longer deductible by the payor. In attempting to answer this difficult question, the Court was greatly aided by excellent briefs by counsel for both parties and after much study and consideration, the Court concludes that the final payment made by the plaintiff did not lose its periodic status, and therefore, the Commission incorrectly assessed a deficiency against the plaintiffs.

The relevant sections of the Internal Revenue Code are § 71(a)(1) and § 215 (a). Section 71(a)(1) reads as follows:

> "DECREE OF DIVORCE OR SEPARATE MAINTENANCE.--If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at

regular intervals) received after such decree in discharge of (or attributable to property transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation."

Section 215(a) reads in pertinent part:

"GENERAL RULE.--In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year."

[1] The Commissioner first questions whether the $9,000.00 payment was even in the nature of alimony or whether the payment was more of a property settlement between the divorced spouses. He points out that the $9,000.00 payment has little resemblance to the $750.00 payments which are admittedly a division of income and admittedly periodic alimony payments. However, a reading of the rather lengthy contract and separation decree, particularly the paragraphs dealing with the division of property, convinces the Court that the $9,000.00 payment was not a part of the property settlement but a continuation of the division of income.

The Court is influenced by the fact

that the size of the payment to be made on the remarriage of Barbara was determined by the amount of her monthly payment which in turn was determined solely on the plaintiff's annual income. Other factors which the Court finds pertinent in determining that the payment was in the nature of alimony or the obligation of marital support are the fact that the payment was contingent on the remarriage of Barbara and that the divorce decree indicates that a great deal of time and study was made in determining the size of the monthly payments which in turn influenced the size of the payment that would be made if Barbara remarried--all of which points to a conscientious effort being made to determine the extent of the plaintiff's obligation to support his divorced wife. Bernatschke v. United States, 364 F.2d 400, 176 Ct.Cl. 1234 (1966).

[2] The Commissioner next argues that, even assuming the payment was in support of the plaintiff's marital obligation, it could not be deducted as a periodic payment as the agreement itself calls for a "lump sum." Admittedly, the $9,000.00 payment appears to be outside the generally accepted notions of periodic payments, and yet the payment is tied inseparably to the monthly payments. If it is a lump sum payment, it is clearly a lump sum of periodic payments. Had the agreement provided for the monthly payments to continue for one year after the remarriage of Barbara instead of giving her the twelve payments at once,

there would be no question that the payments were periodic and therefore deductible. Hollander v. Commissioner of Internal Revenue, 248 F.2d 523 (9th Cir. 1957).

The Commissioner has directed the Court's attention to four cases which he contends support his position that any type of lump sum payment cannot qualify as periodic payments. An examination of these cases, however, reveals several features which distinguish them from the instant case and which prevent these cases from being conclusive in this matter.

In the case of Norton v. Commissioner of Internal Revenue, 192 F.2d 960 (8th Cir. 1951), the separation agreement provided for periodic alimony payments and in addition to these payments, a sum of $5,000.00 as additional alimony was to be paid forthwith. The court decree of divorce made no reference to the $5,000.00, but it was paid by the plaintiff. The $5,000.00 was disallowed as an alimony deduction by the Commissioner and the Tax Court sustained the Commissioner's ruling. The Court of Appeals affirmed the Tax Court and noted that since the $5,000.00 was not a part of the court decree as was the periodic payments, the $5,000.00 was a part of a voluntary agreement, and therefore, the two agreements were separate and distinct obligations. The Court quoted with approval from the decision of the Tax Court:

"'[I]t is clear that the $5,000, not

> decreed by the court as was the $200 a month, is by that fact separated from the periodic payment of alimony and can not with logic be viewed as merely one of the recurring or periodic payments, though in a larger amount than $200.'" (Emphasis added) 192 F.2d at 962.

The Court seems to imply that had the $5,000.00 payment been a part of the same decree and had it been sufficiently tied to the periodic payments, it could have been considered a periodic payment even though in a larger amount.

In the case of Lounsbury v. Commissioner of Internal Revenue, 321 F.2d 925 (9th Cir. 1963), the divorce decree provided for monthly alimony payments in the amount of $250.00 and a payment of $10,000.00 or a home of equivalent value to be paid or provided within two years of the decree. The Commissioner and the Court rejected the taxpayer's argument that the $10,000.00 was simply a "balloon" payment and the final in a series of periodic payments. The Court noted that the lump sum payment in that case was "an arrangement by which a capital transfer was accomplished between husband and wife" rather than "'periodic payments' by which the wife shared in the husband's income".

> "We may assume, arguendo, that the payment was in discharge of a marital (as distinguished from property) obligation. The controlling question, to us, is the

manner in which that duty was met. Here, pursuant to agreement and decree, it was by a lump-sum payment. It was not by 'periodic payments' by which the wife shared in the husband's income. It was rather by an arrangement by which a capital transfer was accomplished between husband and wife." (Emphasis added) 321 F.2d at 926.

In this case the court rejected the "balloon payment" argument because the payment was a fixed amount and had no relationship to the taxpayer's income, and therefore was more in the nature of a capital transfer.

The Commissioner also directs the Court's attention to the case of Commissioner of Internal Revenue v. Senter, 242 F.2d 400 (4th Cir. 1957). In the Senter case the plaintiff agreed to a separation agreement whereby his wife would receive one-third of the amount that the plaintiff was entitled to receive from the estates of his grandparents. He further agreed that should his wife remarry, he would pay her a cash sum equal to what she would be entitled to for a three-year period. When the wife remarried, she was entitled to a lump sum of $43,485.27 which was paid to her. The Court held that this sum did not constitute a periodic payment. The Court discussed the difference between periodic payments and larger, undivided amounts and stated that it was the Court's belief that Congress established the requirement that the payments, to be deductible, had to be

periodic because the lump sum or principal payments were usually in the nature of a division of capital rather than a division of the husband's income. The Court concluded that the $43,485.27 was "not paid as an allowance for support, but is a lump sum cash settlement in the nature of a division of property made in lieu of support." The Senter case deals with the division of two estates and the Court had no trouble finding that the final payment was simply a division of capital, but in the subject case the final payment was clearly based on the plaintiff's income and as discussed earlier, was clearly a part of the plaintiff's obligation to support his wife.

And finally, the Court is directed to Lungaard v. United States, 346 F.Supp. 1351 (D.Kan. 1972) because of its similarity to the instant case. In that case the taxpayer was paying a $200.00 a month alimony payment and had agreed to pay the wife a lump sum of $5,000.00 if the wife remarried within five years. In deciding that the $5,000.00 payment was not a periodic payment, the Court held that the monthly payment and the lump sum payment were separate and distinct obligations. In the instant case the lump sum payment was tied directly to the monthly payments and was a part of the plaintiff's single obligation to provide marital support.

It is important to note that, except for the Senter case which was clearly a division of capital, in each of the

cases cited by the Commissioner the final payments which the courts excluded as periodic payments were all definite and certain amounts and were specified in the divorce decree as to the exact amount that the taxpayer would have to pay. Two of the cases involved no future contingency as to the time of the payment but rather the payment was to be paid "forthwith" in the Norton case and was to be paid within two years in the Lounsbury case. In the Lungaard case the final payment was contingent on the remarriage of the wife, but it was a definite figure agreed to in the divorce decree and had no relationship to the monthly payments. The Court had no trouble finding that the final payment was a definite obligation from the taxpayer's obligation to provide support for his spouse.

In summary, all of the cases cited by the Commissioner dealt with cases where the lump sum payment had no relationship to the taxpayer's division of income in carrying out his obligation to provide support for his wife. While several of the cases did question how a lump sum payment could be a periodic payment, these courts were not faced with a fact situation where the final payment was directly based on the periodic payments and was clearly a division of income. There are cases which have allowed lump sum payments to be deducted as periodic payments such as where the periodic payments were in arrears and had to be caught up. Warley v. McMahon, 148 F.Supp. 388 (S.D.N.Y. 1957). While the twelve payments comprising the

$9,000.00 payment in the instant case were not in arrears, the $9,000.00 payment is clearly a part of the plaintiff's obligation arising out of his marital status to support Barbara and is so closely tied to the monthly periodic payments that it cannot be considered as a separate and distinct obligation, and therefore should be considered as a periodic payment.

For the aforesaid reasons, the defendant's motion for summary judgment is denied and the plaintiffs' motion for summary judgment is hereby granted. Accordingly, a judgment will be entered.

APPENDIX C

APPLICABLE STATUTES

Int. Rev. Code of 1954, § 71:

"§71. Alimony and separate maintenance payments

"(a) General rule. --

"(1) . . . .

"(2) Written separation agreement --If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly.

"(3) . . . .

"(b). . . .

"(c) Principal sum paid in installments. --

"(1) General rule. --For purposes of subsection (a), installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement

shall not be treated as periodic payments.

"(2) Where period for payment is more than 10 years. --If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (notwithstanding paragraph (1)) the installment payments shall be treated as periodic payments for purposes of subsection (a), but (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received."

Int. Rev. Code of 1954, §215:

§215. Alimony, etc., payments

"(a) General rule. --In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment, if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income.

"(b) . . . ."

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition was served on the defendant-respondent by depositing three copies in the United States mail box, with first-class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C., 20530, and by depositing three copies in the United States mail box, with first-class postage prepaid, addressed to Scott P. Crampton, Assistant Attorney General, Department of Justice, Washington, D. C., 20530.

This the 11th day of April, 1974.

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